Mr. Edgar, counsel for the appellant, submitted that since there is nothing on the record to show that the learned trial Judge had convicted the appellant in accordance with the provisions of section 198(1) of the Criminal Procedure Code, the appellant had been sentenced to death by a Judge who had never convicted him.

In support of this argument he cited a recent decision of this Court, *Govindasamy v. Public Prosecutor*[2]. In that case there were two omissions from the record :—

(1) There was nothing to show whether the trial Judge agreed with the opinions of the two Assessors that the accused was guilty.

(2) That the trial Judge had convicted the accused.

In the case before us there is only the second omission. The result is that there is no element of doubt of the guilt of the appellant, because the learned trial Judge has expressed on the record his positive agreement with the opinions of both Assessors that the appellant is guilty. Accordingly there is no doubt that the learned trial Judge brought his mind to bear on the guilt or innocence of the appellant. Therefore, this case is distinguishable from the case of *Govindasamy v. Public Prosecutor* (*supra*) and also from the Privy Council case of *Joseph v. The King*[3] referred to in the *Govindasamy* case.

Accordingly in this case there is nothing left to us by way of conjecture as was so in the *Govindasamy* case. The only matter which remains for consideration is whether the failure of the learned trial Judge to make a note on the record that he convicted the appellant is an illegality which vitiates the trial. It is true, that in the absence of any such note, it cannot be said that the provisions of section 198 of the Criminal Procedure Code have been observed in that respect. This, according to Mr. Edgar, amounts to an illegality which cannot be cured under section 422 of the Criminal Procedure Code. Such a proposition does not accord with the view of the Privy Council in the case of *Pulukuri Kotayya v. King Emperor*[4]. There, Their Lordships of the Privy Council said :—

> "...but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of Their Lordships' Board in *Abdul Rahman v. The King Emperor*[5]".

Section 537 of the Indian Criminal Procedure Code is equivalent to section 422 of our local Code. Therefore applying that part of the judgment underlined above to the case before us we decide that the omission in the record is an irregularity which can be cured under section 422 of the Criminal Procedure Code.

Therefore this appeal is dismissed.

Appeal Dismissed.

HAJI AISHAH BINTE LEBAI ITAM v. YAH BINTI TAIB.

[App. Civil Juris. (Spenser-Wilkinson, Russell, and Briggs, JJ.) October 25, 1948]

[F.M.—Civil Appeal No. 23 of 1948]

Courts Ordinance, 1946, Sections 25 and 29—Courts Enactment, F.M.S. Ss. 16 and 17—Appeal to Court of Appeal—Jurisdiction of Magistrate—Suit relating to immovable property—Courts Enactment, Kedah S. 40(2)—Land Code Ss. 43 and 187—Civil Procedure Code, Kedah S. 116.

In this case the learned Magistrate, Jitra, had made an Order that certain land be re-transferred to the respondent by the Appellants upon her repaying to the Appellants the sum of $150.00, on the ground that the transfer was obtained by a fraudulent misrepresentation. An appeal to the High Court was dismissed and the appellant thereupon appealed to the Court of Appeal. On appeal, it was argued that the learned Magistrate had no jurisdiction to hear the suit as it involved the decision of a question of title to land.

Held, (1) that by virtue of Sections 16 and 17 of the F.M.S. Courts Enactment, an appeal lay from the High Court to the Court of Appeal and even if the subject-matter of the suit is less than $500.00 an appeal would still lie with the leave of the Court of Appeal, on the ground **inter alia**, of an error in law; (2) that the Magistrate had jurisdiction to deal with the matter by virtue of Section 25 of the Courts Ordinance, 1946.

Case referred to :—

(1) *A. S. K. Selvaduray v. Mahmood bin Tawakol* (1935) F.M.S.L.R. 191; (1935) M.L.J. 289.

CIVIL APPEAL.

T. E. Conaghan for the Appellant.

Respondent in person.

Spenser-Wilkinson, J. : — This was an appeal from the decision of the High Court in Alor Star dismissing an appeal to that Court from the decision of the

Magistrate at Jitra. The original claim of the respondent as plaintiff was against one Abdul Aziz bin Haji Musa as Administrator of the Estate of Haji Musa bin Lebai Itam deceased and against the present appellant for the re-transfer to herself of certain land on the footing that she had been induced by the fraud of the late Haji Musa to transfer the land to him; that he had later transferred it to the appellant; and that the appellant was a party to the fraud and, therefore, not entitled to the ordinary immunities of a registered proprietor. The plaintiff owed a sum of $150/- to Haji Musa and was willing to execute a charge of her land in his favour. The fraud alleged was a fraudulent misrepresentation by Haji Musa to the plaintiff, who is illiterate, to the effect that the tranfer to him which she executed was not a transfer, but a charge for the amount she owed. The plaintiff prayed for an order that the land be re-transferred to her by the defendants upon her repaying to the defendants the sum of $150/-. The learned Magistrate upheld the plaintiff's claim and ordered that the defendants should transfer the land back to the plaintiff upon the plaintiff repaying to the defendants the sum of $150/-. It appeared from the evidence in the Magistrate's Court that the value of the land in question was $400/-. An attempt was made before us to refer to an affidavit in which it was stated that the land is now worth over $2,000/-. Its present value is immaterial, and no new evidence could be adduced to show its value at the time of filing the suit without leave of this Court. No application for such leave was made and the affidavit must, therefore, be disregarded.

The learned Judge dismissed the appeal from the Magistrate on the ground that the decision was consistent with the evidence. Thereupon the 2nd defendant applied to the High Court for leave to appeal to the Court of Appeal against the decision of the High Court upon the ground, raised at that stage of the proceedings for the first time, that the learned Magistrate had no jurisdiction to entertain the suit. Upon this ground leave to appeal was given. The first defendant, who has no substantial interest in the proceedings, was not a party to the appeal to the High Court or this appeal.

I was at first in some doubt as to whether any appeal lay from the High Court to the Court of Appeal in this case by reason of the provisions of sections 16 and 17 of the Courts Enactment of the State of Kedah. Mr. Conaghan, however, on behalf of the appellant drew our attention to the provisions of section 29 of the Courts Ordinance, 1946, which lays down that in a Malay State there shall be the same right to appeal to the Court of Appeal from the High Court as is provided by the existing laws of the Federated Malay States. An appeal, therefore, lay from the decision of the High Court to this Court under the provisions of section 15 of the Courts Enactment (of the Federated Malay States); and under section 17 of the same Enactment, even if the subject matter of the suit is less than $500/-, an appeal will still lie with the leave of the Court of Appeal on the ground, *inter alia,* of an error in law.

The application to the learned Judge of the High Court for leave to appeal appears to me to have been in the wrong form as it was made to him in his capacity as a Judge of the High Court, whereas the application should have been made in the Court of Appeal and could have been made to the same Judge in his capacity as a single Judge of the Court of Appeal. This, however, being a mere technicality, and the point of law sought to be raised on the appeal being a substantial one, I considered it right that we should hear the appeal.

The only question which arose for decision in the substantive appeal was whether or not the learned Magistrate had jurisdiction to hear the suit. His jurisdiction was attacked on two grounds: In the first place, on the ground that the subject matter of the suit exceeded the limit of his jurisdiction; and secondly on the ground that a Magistrate has no jurisdiction to entertain any suit which involves the decision of a question of title to land.

The first point can be shortly disposed of by reference to section 25 of the Courts Ordinance, 1946, which increased the jurisdiction of Courts of a Magistrate to suits in which the subject matter does not exceed $500/-. It is clear on the evidence given at the trial that the subject matter of this suit did not exceed $500/- and therefore, *prima facie,* the learned Magistrate had jurisdiction to entertain the suit.

The second point raises a question of considerable difficulty. Mr. Conaghan on behalf of the appellant relied upon sub-section (2) of section 40 of Enactment No. 25 (Courts) of Kedah, the relevant part of which reads as follows :—

> In amplification and not in derogation of the generality of the foregoing powers the said Court may try all suits by and against all persons and bodies corporate, in all cases where the persons who are defendants are present in the State, or the corporate body which is defendant has a place of business in the State: and also in the following cases although the defendant is not present, or had not its place of business as aforesaid in the State, that is to say, if the defendant has property in the

> State or if the whole or any part of the subject matter of the suit is land or other property situate within the State; or where any act, deed, will or thing affecting such land or property was done, executed or made within the State:.....

Reliance was placed particularly upon the words underlined. Mr. Conaghan argued from this that as the High Court of Kedah was given jurisdiction to deal with suits relating to land then by implication such suit should not be heard by a Magistrate. I do not think, however, that this sub-section is of much assistance, as its effect is merely to explain the general words of the previous sub-section and to deal with cases where the defendant is not present in the State. The general object of the sub-section is to show in what cases the Court has jurisdiction, when the primary basis of all jurisdiction, i.e. the physical presence of the defendant within the local limits of jurisdiction, does not exist. One of such cases is where the defendant, though personally absent, has land within the State, and the suit concerns such land. This raises no inference in the present case, where both land and defendants were within the State. Moreover, I am of opinion that the question of jurisdiction depends primarily not upon the laws of Kedah but upon the provisions of the Courts Ordinance, 1946.

Mr. Conaghan also relied upon the decision in *A. S. K. Selvaduray v. Mahmood bin Tawakol*[1]. In that case it was held that the Court of a First Class Magistrate in Selangor was not empowered to order the sale of immovable property under sub-section 134(1) of the Land Code, 1926; and in the course of his judgment in that case the learned Chief Justice stated that the intention of the whole Enactment (i.e. the Federated Malay States Land Code) was that it should be administered by the Supreme Court except where it was otherwise specifically stated. This opinion was based to some extent upon the fact that in the Land Code the words "the Court" are defined as meaning the Supreme Court. *A fortiori,* therefore, in the Kedah Land Enactment all references to the Court must mean the High Court because the definition in this Enactment is not of the words "the Court" but of the word "Court". If the above quoted decision, therefore, is sound it follows that the Land Code of Kedah is intended to be administered by the High Court and by the High Court only.

In my opinion, however, this by no means concludes the matter which has now to be decided. The learned Magistrate in the case now before us was not asked to administer the Land Code nor did his decision or his Order have any direct reference to the Land Code. The actual Order he made was that the defendants should re-transfer the land to the plaintiff. It is true that the effect of his decision was to decide the question of the beneficial ownership of the land but I am unable to see that in deciding such a question a Court is necessarily administering the Land Code. The decision in the suit did not directly affect the registered title to the land. The question which the learned Magistrate had to decide was substantially a question of fraud and was purely a question of fact. It may well be that the learned Magistrate had regard, in considering the questions before him, to the provisions of section 43 of the Land Code, but his Order was not made under any specific provision of that Code and I do not think that he purported to administer the Code in any way. If he had made an order that the register be rectified by expunging the fraudulent transfer to Haji Musa and the subsequent fraudulent transfer to the Appellant, I think he would have been "administering the Land Code"; and in view of the terms of section 187 of the Land Code and of the definition of "Court" above referred to, such an Order might well have been beyond his jurisdiction; but he did not do so.

I can find nothing in the Land Code or in any decided cases which, in respect of the question now at issue, modifies in any way the clear and express provisions of section 25 of the Courts Ordinance, 1946, the first portion of which reads as follows :—

> A Court of a Magistrate shall have jurisdiction to try all original actions and proceedings of a civil nature of which the amount in dispute or value of the subject matter does not exceed $500/-.....

The section goes on to deal with jurisdiction in respect of "all other matters of a civil nature". I read this as meaning matters of a civil nature which are not original actions or proceedings. The suit we are concerned with here being an original action is governed, therefore, by the first part of the section.

It is perhaps pertinent to observe that in section 57 of the Courts Enactment of the Federated Malay States there is an express limitation of the powers of a Magistrate of the First Class in respect of claims for recovery of immovable property; and a complete prohibition in section 59 against a Magistrate of the Second Class entertaining any suit for recovery of or for the determination of any right or interest in immovable property. The legislature in passing the Courts Ordinance, 1946, has not thought fit to re-enact either of these limitations upon jurisdiction and it seems to me, therefore, that in the absence of express words it would be wrong to imply any such limitation in the face of the clear words of section 25 of the Ordinance above quoted.

Not only does it seem to me that the question at issue was one which could be decided by the Magistrate, but also there appears to exist express provision for enforcing the very type of Order which was made. The provisions of the Kedah Civil Procedure Code relating to the Mode of Executing Decrees clearly apply to all Courts and amongst them is section 116 which reads as follows :—

> If the decree be for the specific performance of a contract or for the performance of or abstention from any particular act and the party against whom it was made has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his imprisonment for contempt of Court or by the attachment of his property, or by both.

Here the decree made by the Magistrate is for the performance of a particular act by the parties against whom it was made — viz. to re-transfer the land. The appellant, being the registered proprietor, is in a position to effect this re-transfer and having been found a party to the original fraud, has been properly ordered to do so.

For the above reasons I am of opinion that the Magistrate in this case had jurisdiction to hear and determine the suit. The appeal is dismissed with costs.

Russell, J. : — I have had the advantage of reading the judgment of the learned President. I agree with it and do not wish to add anything.

Briggs, J. : — I too have had the advantage of reading the judgment of the learned President. I also agree with it and have nothing to add.

Appeal Dismissed.

SEE YEW POO v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Russell, JJ.) December 9, 1948]

[K.L. — Criminal Appeal No. 129 of 1948]

Criminal Procedure Code Ss. 163, 164, 422 — Separate charge for every distinct offence — Whether failure to comply with provisions of Section 163 of the Criminal Procedure Code is an illegality or an irregularity — Deposition of absent witness — Evidence Enactment S. 33.

This was an appeal against the conviction of the appellant on the following charge "That you between 7 and 8 p.m. on the 20th of May 1948 on Chuan Moh San Estate, Tenang, in the State of Johore, robbed Tee Puet Kiat and Tee Kern and at the time of committing the said robbery you were armed with a deadly weapon, to wit a revolver and that you thereby committed an offence punishable under Sections 392 and 397 of the Penal Code" At the trial the deposition of a witness who was under arrest at the time of the trial was admitted.

Held, (1) that in the present case each of the offences should have been made the subject of a separate charge; (2) that the duplicity of charges was merely an irregularity which can be cured under the provisions of Section 422 of the Criminal Procedure Code provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity; (3) that in fact the framing of the charge in the case caused confusion in the mind of the learned judge and that therefore there was the possibility of a failure of justice; (4) that the power to admit the deposition of absent witnesses under Section 33 of the Evidence Enactment should be exercised with caution and as there was nothing on the record to show that the witness could not, by care and the use of ordinary means, have been produced to give evidence, the deposition was improperly admitted in evidence in this case.

Cases referred to :—

(1) *N. A. Subramania Iyer v. King Emperor* (1900-1) 28 Indian Appeals 257.

(2) *Gul Mohamed Sircar v. Cheraru Mandal* (1905) 10 Cal. W.N. 53.

(3) *Emperor v. Fattu* (1903) I.L.R. 26 Allahabad 195.

(4) *Johan Subarna v. King Emperor* (1905) 10 Cal. W.N. 520.

(5) *Ram Subheg Singh v. King Emperor* (1914-15) 19 Cal. W.N. 972.

(6) *Maharuddin Malita v. Jadu Nath Mandal* (1906) II Cal. W.N. 54.

(7) *Musai Singh v. King Emperor* (1913) I.L.R. 41 Cal. 66.

(8) *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram Mudi* (1932) 50 I.L.R. Cal. 1233.

(9) *Sachidanand Prasad v. Emperor* (1933) A.I.R. Patna 488.

(10) *Mendilal v. Emperor* (1934) A.I.R. (Oudh) 244.

(11) *Yap Leow Swee v. Public Prosecutor* (1937) F.M.S.L.R. 71; (1937) M.L.J. 225.

(12) *Mowyar alias Nane Khan v. The Queen* 20 Cal. Weekly Reporter 69.

CRIMINAL APPEAL.

K. C. Chia for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Russell, J. : — The appellant was charged with the armed robbery of two persons Tee Puet Kiat and Tee Kern on Chuan Moh San estate, Tenang, in the State of Johore between 7 and 8 p.m. on the 20th of May, 1948, an offence punishable under sections 392 and